INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
1. Interference, restraint and coercion	2
2. Discriminatory layoffs of groups of employees	4
3. Discriminatory treatment of individual union employees	6
B. The Board's conclusions and order and the decision of the court of appeals	8
Argument	8
Conclusion	11

CITATIONS

Cases:

American Freightways Co., 124 NLRB 146	9
International Assn. of Machinists v. *National Labor Relations Board*, 311 U.S. 72	10
National Labor Relations Board v. *Bradford Dyeing Assn.*, 310 U.S. 318	10
National Labor Relations Board v. *Brown*, 380 U.S. 278	11
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	9

Cases—Continued

	Page
National Labor Relations Board v. *Exchange Parts Co.*, 375 U.S. 405	9
National Labor Relations Board v. *Walton Manufacturing Co.*, 369 U.S. 404	10
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	9
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	9, 10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	10

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	
Section 8(a)(1)	2, 8, 9, 10
Section 8(a)(3)	2, 8, 9, 10
Section 10(c)	9

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 979

ERTEL MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–22) is reported at 352 F. 2d 916. The Board's Decision and Order (J.A. 2–60)[1] are reported at 147 N.L.R.B. 312.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1965 (Pet. 15, 22). A petition for rehearing was denied on November 30, 1965, and a decree entered on December 16, 1965 (Pet. 2). The petition for a writ of certiorari was filed on February

[1] "J.A." refers to the Joint Appendix in the court below, which has been filed with the petition.

4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was substantial evidence on the whole record in support of the Board's finding that petitioner coerced and restrained its employees in the exercise of their organizational rights and discriminated against employees because of their union membership, in violation of Sections 8(a) (1) and (3) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at Pet. 2–5.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. INTERFERENCE, RESTRAINT AND COERCION

The Union [2] started an organizing campaign among the Company's [3] employees in April and May 1963. Union cards and union buttons were distributed and organizational meetings were held (J.A. 15–16; 65–70, 73–74). About half the employees wore the buttons openly during working hours; the Company knew their identity and was aware of the organizing campaign (J.A. 16; 77, 110, 167).

Since 1957, the Company has had shop rules prohibiting during both working time and the employees'

[2] International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO.

[3] The Company is engaged in the manufacture and sale of automotive parts, mainly pistons (J.A. 4).

own time distribution of written or printed matter or solicitation on Company property without the specific approval of management (J.A. 16–17; 287–288, 307). Employee Sweet obtained numerous authorization cards on behalf of the Union early in May 1963, before work time and during meal breaks (J.A. 17; 134–136). On May 3, Supervisor Enochs told Sweet that he was subject to immediate dismissal for passing out "illegal literature" (J.A. 17; 136–137).

Employee Cloyd also solicited authorization cards on Company property during non-working hours (J.A. 18; 183). On May 3, Superintendent Enochs likewise warned him that he was subject to immediate dismissal for violating the rules about distributing literature and soliciting on Company property without approval (J.A. 18; 184–186).

On May 15, Supervisor Zigler told employee Russell before work time to put his union cards out of sight. When Sweet advised Zigler that employees could solicit on their own time, Zigler replied that it was against a Company rule (J.A. 18; 143–145, 150, 174).

After May 3, employee Greer wore union and organizing buttons in the plant. Supervisor Aurs, on learning from Greer that he had signed a union card, stated that the Company would cut the hours of work and that this would offset any increase in wages the Union might obtain (J.A. 21; 263–264). Subsequently, Aurs asked Greer whether he liked the Christmas bonus and the extra hours of work in the plant, adding: "I see you're still wearing your badges. You must have plenty of money or don't want no job" (J.A. 21; 269).

Early in May, Supervisor Longworth told employee Pemberton that, if the Union got into the plant, the men would have time to go fishing all summer, and warned employee Beck that, if Beck continued to wear a union button, he would probably be out of a job before the end of the month (J.A. 21–22; 196–197, 206, 239). Longworth also stated to Beck that, if the Union "got in," the Company would just close its doors (J.A. 10, 22; 206, 239).

Employee Pemberton was absent from work on May 10; on his return, Plant Manager Hopper instructed him to obtain clearance from higher management. When Pemberton reported back, Hopper told him that he should be careful, that he was wearing a union button, and that "they" would be watching him (J.A. 22–23; 198–199, and see 303).

2. DISCRIMINATORY LAYOFFS OF GROUPS OF EMPLOYEES

On the morning of May 15, Supervisor Zigler sent home six employees working in the piston department, all but one of whom were members of the Union's organizing committee.[4] Zigler told them to call back early on May 17 (J.A. 23; 66–68, 247, 306). While Zigler stated that the employees were released because of low air pressure, the pressure was sufficient to operate the machines on which three of the laid-off men had been working (J.A. 23–24; 105–106, 145–146, 285–286), and the three other laid-off employees had been working on machines that did not require air pressure

[4] The employees were selected by Superintendent Enochs (J.A. 24; 104).

(J.A. 24–25; 105; 147–148). On prior occasions when the air pressure in the piston department had been too low for proper operation of the machines, the Company's practice had been not to lay off employees but to transfer them temporarily to another department (J.A. 24–25; 148). As the laid-off men walked through the production department on their way out of the plant, Supervisor Aurs told employee Greer, "there goes some more of your union buddies, going out * * *" (J.A. 26; 266).

On May 24, the Company discontinued the night shift in the aluminum piston department, and some night-shift men were transferred to the day shift (J.A. 24, 28; 63, 305). On May 24 and 31, a total of 21 employees were laid off—some from the night shift and some from the day shift—and two setup men were demoted to operators (J.A. 28; 276–277, 292–293). Seventeen of the laid-off employees were members of the Union, and 13 of these were members of its organizing committee. (See J.A. 28; 67–70, 79–80, 83, 94, 101–102, 134, 163, 203, 207, 216, 234, 238, 243–244, 306–307.) The employees were not forewarned about the layoff. Supervisor Zigler stated that "lack of work" was the reason for the action (J.A. 29, 45; 84–85, 109, 212, 219–220, 297–298, 308), though at the time the Company was negotiating with another manufacturer of pistons for the production of aluminum pistons for the Company in quantities greatly in excess of those previously obtained from that firm (J.A. 29–30, 43–45; 155, 248–253).

3. DISCRIMINATORY TREATMENT OF INDIVIDUAL UNION EMPLOYEES

On May 16, Sweet, who had previously been threatened with dismissal by Superintendent Enochs because of his union solicitation (J.A. 17, 136–137), was suspended for one week by General Foreman Carr, ostensibly because of "insubordination, vile language and passing out illegal literature" (J.A. 26–27; 150–153, 307–308). When Sweet asked Carr to specify the nature of the insubordination, both Carr and Personnel Director Hopper refused any explanation (J.A. 26–27; 151–154). On May 31, after returning to work, Sweet was demoted by Superintendent Enochs from setup man on the day shift to machine operator with a reduction in pay; this occurred at the same time that Supervisor Zigler informed the day-shift employees of their layoffs (J.A. 34; 118, 125–130, 165–166; see *supra,* p. 5). The Company claimed that the demotion was caused by lack of work; but this left only three setup men to do the work previously performed by four, even though the number of operators on the day shift had been reduced only slightly, from 22 to 21 (J.A. 28, 34–35; 275–277, 291–293).

Employee Beck was a member of the Union and its organizing committee and wore union buttons while at work (J.A. 35; 203–205, 206–207). His work consisted of packing pistons and preparing packing boxes (J.A. 35; 203). When he reported for work on May 21, Supervisor Zigler told him that he was laid off for lack of work (J.A. 35; 203–204, 212–213). However, on that day there were a greater number of pistons to be packed than on normal days (*ibid.*).

Employee Plymate signed a union authorization card, was a member of the organizing committee, and wore union buttons at work (J.A. 36; 267–268, 271). Early in May, Bowman, an ex-employee of the Company, told Plymate that someone owed him money, and at his request Plymate drove him to a part of the city unfamiliar to Plymate (J.A. 36–37; 269–271). In fact, Plymate drove to a place near the Company's warehouse, where a burglary was committed (*ibid.*). Plymate was closely questioned by the police, to whom he explained his presence at the location, and he was not arrested or detained in any manner (J.A. 37; 268, 271). He was never charged with any crime with reference to the event (*ibid.*). On the following morning, Plymate explained the matter to Superintendent Enochs and went to work (J.A. 37; 268, 270–271). About two weeks later he was discharged upon the instruction of Enochs, without receiving any explanation (J.A. 36; 267–268).

Employee Cloyd was promoted from machinist to setup man, with an increase in wages, in April 1962 (J.A. 42; 172–173). He became a member of the organizing committee, wore union buttons at work, and distributed union authorization cards (J.A. 42, 181–183). As stated (supra, p. 3), he was threatened with dismissal for distributing union cards on his own time; and on June 24, 1963, the Company demoted him from setup man to machinist, without giving him any explanation (J.A. 42; 173, 186–187).

B. THE BOARD'S CONCLUSIONS AND ORDER AND THE DECISION OF THE COURT OF APPEALS

The Board found that the Company had violated Section 8(a)(1) of the Act by promulgating and applying its no-distribution and no-solicitation rules to activity on the employees' own time, and by the threats of reprisal of Personnel Manager Hopper and Supervisors Aurs and Longworth (J.A. 16–23). The Board further found that the Company had discriminated against its employees in violation of Section 8(a)(3) by the layoff of 6 employees on May 15, 1963, the layoff of 21 employees on May 29 and 31, and the suspension and demotion of Sweet, the layoff of Beck, the discharge of Plymate, and the demotion of Cloyd (J.A. 43–46).

The Board's order (J.A. 56–58) required the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily discharged or laid off and not recalled, and to make whole the employees discriminatorily laid off and later recalled.

The court of appeals held that the Board's findings were supported by substantial evidence, and enforced the Board's order in its entirety (Pet. 15–22).

ARGUMENT

1. Petitioner's basic contention is that the Board improperly applies a different standard in determining whether there is a violation of Section 8(a)(1) of the National Labor Relations Act from that it applies under Section 8(a)(3). Under Section 8(a)(1), petitioner argues, the Board's standard of proof is

"whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act" whereas in cases involving discriminatory changes in employee status under Section 8(a)(3) (*e.g., American Freightways Co.,* 124 N.L.R.B. 146, 147), the Board requires proof by "the preponderance of the evidence." There is no substance to this contention, which confuses findings of evidentiary facts with the conclusions or inferences which the Board may properly draw from them. As to evidentiary facts, Section 10(c) of the Act requires that they must be established by "the preponderance of the testimony" adduced at the hearing before the Board or its Trial Examiner. After the evidentiary facts have thus been established, the Board—whether the question is violation of Section 8(a)(1) or violation of Section 8(a)(3)—"may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 800. See, also, *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 48–49; *National Labor Relations Board v. Erie Resistor Corp.,* 373 U.S. 221, 227–229, 236; *National Labor Relations Board* v. *Exchange Parts Co.,* 375 U.S. 405, 409.

This standard was fully satisfied here. The evidentiary facts respecting the Company's overly broad no-distribution and no-solicitation rules and the threats of its supervisors were established by a preponderance of the testimony adduced at the Board hearing.

The Board could then properly conclude, as it did, that such rules and conduct would tend to interfere with the exercise of employee organizational rights. For there is no doubt that an employer violates Section 8(a)(1) of the Act by barring the distribution of union literature and union solicitation by employees on their own time and the wearing of union insignia (*Republic Aviation Corp.* v. *National Labor Relations Board, supra*), or threatening that unionization will lead to loss of earnings or plant shut down. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 338; *International Assn. of Machinists* v. *National Labor Relations Board,* 311 U.S. 72, 76.

2. Petitioner further contends that the Board's findings of discriminatory motivation for the discharge of Plymate and for the mass layoffs on May 29 and 31 (Pet. 10–13) were not supported by substantial evidence. This question does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491; *National Labor Relations Board* v. *Walton Manufacturing Co.,* 369 U.S. 404. In any event, the facts detailed in the Statement, *supra,* pp. 4–7, fully warranted the conclusion of the court below "that substantial evidence on the whole [record] supports the Board's finding that the Company violated Section 8(a)(3) of the Act by laying off two groups of employees for union membership and activity, and by laying off,

demoting and discharging individual employees for the same reason" (Pet. 22).[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
HANS J. LEHMANN,
Attorney,
National Labor Relations Board.

MARCH 1966.

---

[5] Petitioner's reliance (Pet. 10, 13) on *National Labor Relations Board* v. *Brown*, 380 U.S. 278, is misplaced. In that case the employers' actions were found to have been motivated by legitimate business ends (*ibid.*, at 287–288) and there was no anti-union motivation, whereas here the Board and the court below found that the business reasons given by petitioner were pretexts and that petitioner was in fact actuated by a desire to discourage membership in the Union.

U.S. GOVERNMENT PRINTING OFFICE: 1966